No. 17-8151

IN THE
Supreme Court of the United States

RUSSELL BUCKLEW,

Petitioner,

v.

ANNE PRECYTHE, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the district court abused its considerable discretion in denying Petitioner Russell Bucklew's request for discovery into the training and qualifications of the execution team, when the evidence in the record demonstrated numerous safeguards in Missouri's execution procedure and established that any difficulty in accessing Bucklew's veins would constitute, at most, an isolated mishap, which does not implicate the Eighth Amendment.

2. Whether, in asserting an as-applied challenge to Missouri's method of execution, Bucklew must prove a known and available, readily feasible alternative method of execution, which this Court has recognized as "a requirement of all Eighth Amendment method-of-execution claims." *Glossip* v. *Gross*, 135 S. Ct. 2726, 2731 (2015).

3. Whether Bucklew met his burden of creating a genuine dispute of material fact on either of the *Glossip* elements, when he failed to identify an alternative method of execution with any specificity, proposed an untested alternative that has never been used, failed to provide evidence that his alternative method would be less painful, and failed to rebut the State's evidence that pentobarbital will swiftly render him deeply unconscious and insensate to any pain or suffering.

4. Whether petitioner met his burden under *Glossip* to prove what procedures would be used to administer his proposed alternative method of execution, the severity and duration of pain likely to be produced, and how they compare to the State's method of execution.

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INTRODUCTION

Justice is long overdue for Russell Bucklew. Over 22 years ago, in a vicious crime spree, Bucklew committed murder, attempted murder, kidnapping, rape, escape from jail, and assault. He was convicted and sentenced to death. He now seeks an effective exemption to the death penalty through an as-applied challenge to Missouri's method of execution.

Bucklew filed this lawsuit 12 days before his first scheduled execution in May 2014, claiming that Missouri's single-drug protocol for lethal injection will be "cruel and unusual" as applied to him because he has cavernous hemangioma. His claim was implausible from the outset. Missouri's single-drug protocol is the most humane and effective method of execution available. Pentobarbital, which Missouri uses for executions, will render Bucklew unable to feel pain within 20 to 30 seconds, and likely sooner. Missouri has conducted 20 pentobarbital executions with no indication of suffering.

By advancing this implausible claim, Bucklew has delayed his execution by over four years. He now asks this Court to revise the elements of method-of-execution claims and make it easier for inmates to bring as-applied challenges. His proposal would transform every as-applied challenge into a potential exemption from capital punishment. This Court should hold that both facial and as-applied challenges to a State's method of execution require the same elements, and that Bucklew failed to carry his burden of proof on those elements.

This Court should affirm the judgment and permit the State of Missouri to carry out Bucklew's lawful sentence without further delay.

STATEMENT OF THE CASE

I. Bucklew's Crime[1]

In February 1996, Bucklew's girlfriend, Stephanie Ray, told him she wanted to end their relationship. *Bucklew* v. *Luebbers*, 436 F.3d 1010, 1013 (8th Cir. 2006). "On March 6, 1996, Bucklew returned to the trailer that he and Ray had shared, where Ray was still living, and found Michael Sanders there." *Id.* at 1013. "Bucklew put a knife to Sanders' throat and threatened to kill him." *Id.*

"Later that evening, Bucklew found Ray and threatened her with a knife, cut her jaw, and punched her in the face." *Id.* "Bucklew called Ray at work the next day and vowed the he would kill her, Sanders, and her children if he found them together again." *Id.* "Ray felt it was unsafe to return to her home, so she and her children moved into Sanders' trailer." *Id.*

"Sometime during the night of March 20–21, Bucklew stole his nephew's car, two of his brother's pistols, two sets of his brother's handcuffs, and a roll of duct tape." *State* v. *Bucklew*, 973 S.W.2d 83, 86 (Mo. 1998). "By the afternoon of March 21, Bucklew began surreptitiously following Ray as she left work and ran errands, ultimately discovering where she lived by following her to Sanders's trailer." *Id.* At that time, Sanders and Ray were inside the trailer

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[1] This four-part article provides extensive background about the crime and the effect on the victims. Scott Moyers, *Penalty of Death*, SOUTHEAST MISSOURIAN (March 20–23, 2011), *at* http://www.semissourian.com/story/1712037.html; http://www.semissourian.com/story/1712093.html; http://www.semissourian.com/story/1712328.html; https://www.semissourian.com/story/1712661.html.

with four young children—Sanders' two sons, aged four and six, and Ray's two young daughters. Bucklew brought "at least 34 bullets" in multiple clips with him to the trailer. *Bucklew* v. *State*, 38 S.W.3d 395, 400 (Mo. 2001).

Bucklew knocked on the door of the trailer. *Bucklew*, 973 S.W.2d at 86. "Sanders saw Bucklew through a window, escorted the children to a back bedroom, and grabbed a shotgun," *id.*, which he barely knew how to use. Moyers, *supra* n.1 "Bucklew entered the trailer with a pistol in each hand. Sanders came into the hallway carrying the shotgun." *Bucklew*, 973 S.W.2d at 86. Bucklew "yelled 'get down' and without further warning began shooting at Sanders." *Id.* "Sanders fell, struck by two bullets, one of which entered his chest and tore through his lung." *Id.* "Bucklew aimed the gun at Sanders's head, but when he saw Sanders's six-year-old son, Bucklew fired at the boy instead. The shot missed." *Id.*

Ray "stepped between Bucklew and Sanders, who was holding his chest as he slumped against the wall." *Id.* Bucklew then "pistol-whipped [Ray], breaking her jaw, and knocking her to the kitchen floor in a semi-coherent condition." *Id.* at 91. He handcuffed Ray and dragged her into the stolen car. *Id.* at 86. Ray's two young daughters watched Bucklew abduct their mother, and as he took her away, "her children cried." *Id.* at 91.

In the stolen car, Bucklew drove Ray over 100 miles. Moyers, *supra* n.1. During the five-hour ordeal, Bucklew demanded oral sex from Ray while he drove. *Id.* He also "took her to a secluded spot and put a gun to her head and raped her while her

hands were taped in front of her body." *Bucklew*, 973 S.W.2d at 91.

During the abduction, Bucklew bragged to Ray that he "found it funny that he had killed Sanders and that he knew [Sanders] was dead because he had used hollow point bullets" to shoot Sanders. *Id.* (alterations omitted). He boasted that the murder scene "was so far out in the country that [the hollow-point bullets] would rip through [Sanders] and it would kill him before anybody had a chance to help him." *Id.* Bucklew also stated that "he was not going back to prison and would take as many police officers with him as he could in a shootout with police." *Id.* at 93.

"By this time law enforcement authorities had broadcast a description of the Bucklew car," and a Highway Patrol trooper "saw the car, called for assistance, and began following Bucklew." *Id.* at 86–87. Bucklew was apprehended after a car chase and a shootout with police, during which he menaced officers with a gun and fired at them. *Id.* at 87. During the shootout, Bucklew and Ray received gunshot wounds, and a trooper was injured by broken glass. Moyers, *supra* n.1.

In the meantime, "Michael Sanders bled to death from his wounds." *Bucklew*, 973 S.W.2d at 87.

While awaiting trial for murder, Bucklew "escape[d] from jail prior to trial, during which he attacked Ray's mother and her mother's fiancé with a hammer." *Bucklew*, 436 F.3d at 1014. His escape involved elaborate planning, as he lost 15 pounds—claiming to jailers that his cavernous hemangioma interfered with his ability to eat—to escape from jail concealed in a trash bag. Moyers, *supra* n.1. He then evaded a massive manhunt and concealed

himself in a closet in the home of Ray's mother and her fiancé. *Id.* When they returned to the home unsuspecting, he burst from the closet and attacked them with a knife and a hammer. *Id.*

Both before and after the murder, Bucklew amassed an "extensive criminal history including prior convictions for trespass, assault, burglary, stealing, driving while intoxicated, possession of marijuana, grand theft, assaulting past girlfriends, and escape from jail prior to trial." *Bucklew*, 436 F.3d at 1014.

II. Missouri's Single-Drug Execution Protocol

Missouri employs a single-drug protocol using a barbiturate, pentobarbital, which depresses the central nervous system, causing near-instantaneous unconsciousness. Pentobarbital renders the inmate deeply unconscious and insensate to pain within 20 to 30 seconds of administration, and probably much faster. J.A. 299–301, 304, 313, 325, 471–72. Missouri's single-drug protocol constitutes "the most humane and effective method of execution possible," and "the 'best practice.'" J.A. 705.

Since adopting the single-drug protocol in 2013, Missouri has administered 20 executions using pentobarbital. All "have been rapid and painless," with "the offender . . . seemingly unconscious within a few seconds." J.A. 526. "Numerous eyewitness observations of nineteen (19) executions in Missouri (from 11-20-13 to 5-11-16) indicate that pentobarbital has its intended effect: a rapid onset of unconsciousness followed by death." D.Ct. Doc. 182-1, at 219; *see also* Collin Lingo, *Mark Christeson Executed Almost 19 Years After Triple Murder*

Conviction, OzarksFirst.com (Jan. 31, 2017)[2] (describing the twentieth execution).

The execution team includes a nurse and an board-certified anesthesiologist, known as "M2" and "M3." J.A. 213, 833; *see also* J.A. 380, 531; *Zink* v. *Lombardi*, No. 2:12-CV-4209-NKL, 2013 WL 11762153, at *1 (W.D. Mo. June 18, 2013). These medical professionals "receive [the inmate's] medical records" before the execution, J.A. 627, not just a one-page summary of his health condition.

Missouri's protocol first requires medical personnel to divide five grams of pentobarbital into two syringes. J.A. 213. Five grams is "ten times the amount" needed to render a person comatose. J.A. 468–69. Then, the inmate is strapped to a gurney. J.A. 214. The gurney is adjustable, and the anesthesiologist is free to "adjust the gurney" if "that would be in the best medical interest of the offender." J.A. 531.

Once the inmate is situated, the medical personnel insert an IV into a peripheral or central vein. J.A. 214. Both nurses and anesthesiologists are trained to access peripheral veins, and anesthesiologists are trained to access central veins. J.A. 336, 463.

Although Bucklew has suboptimal peripheral veins in his arms, nothing in the protocol requires use of a peripheral vein. The protocol instructs the team to insert the IV in "the most appropriate locations," and provides that "[m]edical personnel may insert the primary IV line as a peripheral line or as a central venous line (e.g., femoral, jugular, or

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[2] https://www.ozarksfirst.com/news/mark-christeson-executed-almost-19-years-after-triple-murder-conviction/648046088.

subclavian) provided they have appropriate training, education and experience for that procedure." J.A. 214. Bucklew's expert agrees that "a medical professional will typically start by trying to place the needle in the best available vein." J.A. 231. And "there is no evidence in the Record establishing that [Bucklew] has any problem with his veins *other* than his peripheral veins." J.A. 821 (emphasis in original).

Similarly, nothing in the protocol mandates a "cutdown" procedure. J.A. 213–15. A cutdown is used in the rare occasion where *no* vein is accessible, not even a central vein, such as an emergency room patient with severe trauma. J.A. 346. Bucklew does not dispute that his central veins can be used for IV access, J.A. 821, and the femoral vein is "easily accessed." J.A. 350. Further, no evidence in the record suggests that the peripheral veins in Bucklew's feet or legs are unsuitable.

Bucklew discusses the possibility of a vein rupturing, Br. 11, but his expert conceded that, because central veins are so large, medical personnel can use those veins "without serious risk of rupture." J.A. 863. Bucklew's expert testified that it "seemed unlikely" that a femoral vein would rupture during lethal injection. J.A. 148.

Once an IV is inserted, nonmedical personnel inject the chemicals "under the observation of medical personnel." J.A. 214. Medical personnel then examine the inmate and confirm that death has occurred. J.A. 215.

The protocol includes numerous features designed to minimize risk. As in *Baze*, medical personnel must "establish both primary and backup [IV] lines" and "prepare two sets of the lethal

injection drugs." *Baze* v. *Rees*, 553 U.S. 35, 55 (2008) (plurality opinion) (praising these "redundant measures"); J.A. 213–14. Similarly, just as in *Glossip*, the medical personnel "must confirm the viability of the IV sites" and "monitor [the] inmate." *Glossip* v. *Gross*, 135 S. Ct. 2726, 2742 (2015). The execution team adjusts the gurney "so that medical personnel can observe the prisoner's face," and the medical personnel continuously observe the team members who inject pentobarbital. J.A. 214–15.

III. Bucklew's Medical Condition

A. Bucklew's cavernous hemangioma

Bucklew has a rare medical condition known as cavernous hemangioma. Hemangioma refers to localized excesses of blood vessels, which usually resolve without treatment. A. Munden, et al., *Prospective Study of Infantile Hemangiomas: Incidence, Clinical Characteristics and Association with Placental Anomalies*, 170(4) BR. J. DERMATOL. 907, 907–13 (2014).[3] Variants of hemangioma occur in at least 10 percent of the population. *Id.* Bucklew's rarer variant—cavernous hemangioma—causes some blood vessels in acute regions to dilate and widen. J.A. 224–25. This dilation causes the vessel walls to weaken in some areas, allowing blood seepage. J.A. 224–25.

Some of Bucklew's vessel growths are near the airway, in his mouth and on his uvula. Although Bucklew asserts that minor irritations such as "snoring and eating chips" can cause blood to seep,

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[3] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4410180/pdf/nihms597331.pdf.

Br. 5, on the "typical" night, he sleeps through any blood seepage. *Id.* at 6–7; J.A. 227. In 12 years of treating Bucklew, his primary-care doctor has "never seen [Bucklew] present with a bleed. . . . I've never seen a bleed." J.A. 641–42. Bucklew has also never shown signs of having trouble breathing while with his doctor, and he does not display "respiratory distress or difficulty breathing" while seeking prison medical care. J.A. 643.

Bucklew has experienced this condition for several decades, and some vessels have grown worse. J.A. 224–25. But the growth near his airway shrunk nearly ten percent between 2010 and 2016. J.A. 238.

B. Bucklew's evolving theories of how lethal injection will affect him

Throughout this case, Bucklew has asserted at least eight different theories to explain how his cavernous hemangioma will render his execution by lethal injection unconstitutionally cruel.

First, the Fourth Amended Complaint alleged that (1) Bucklew's condition would interfere with circulation, delaying the effect of pentobarbital. *See* J.A. 64–65; *accord* J.A. 45, 47, 56, 62, 67, 73, 84. Bucklew's expert admitted that there was no evidence to support this theory, J.A. 179–80, even though the same expert had submitted a sworn affidavit advancing the theory. J.A. 65, 92. "[T]he Record confirms that Plaintiff's medical condition will not affect the flow of chemicals in his bloodstream once they are introduced through the femoral vein, or otherwise affect his expected response to the pentobarbital." J.A. 821. Bucklew has abandoned this theory.

To support this theory, the Fourth Amended Complaint alleged that lethal gas was preferable to lethal injection because "lethal gas will bypass Mr. Bucklew's impaired circulatory system." J.A. 43; *see also* J.A. 53. But this allegation contradicted elementary biology. "The use of various gases . . . work by the gas entering the lungs, and then being transported by the circulatory system." J.A. 256. Bucklew has abandoned this theory as well.

The Fourth Amended Complaint also alleged the following additional theories: (2) that Bucklew faced "a substantial risk of an adverse drug interaction during an execution by lethal injection," J.A. 48, 66, 68; (3) that the veins in his head and throat could easily rupture during the execution, J.A. 62, 73; (4) that the use of "methylene blue," a dye used to check IV lines, would "cause a rise in blood pressure" during the execution, rupturing Bucklew's hemangiomas, J.A. 49, 66, 75; and (5) that, *without* the use of methylene blue, "the lethal drug will not properly enter Mr. Bucklew's veins," J.A. 62, 76–77. Bucklew has abandoned these theories as well.

Bucklew's complaint also alleged (6) that lethal injection poses unique risks because he cannot lie "supine"—that is, flat on his back—"without suffocating." J.A. 70, 78; *accord* J.A. 226. But then, "[i]n December 2016, Bucklew lay supine for over an hour undergoing an MRI, with no more than discomfort." J.A. 864. Bucklew "was able to tolerate an MRI, he was supine for more than hour," so he is able . . . to lie supine." J.A. 385. Bucklew's medical notes also report that "he has been seen to sleep supine." J.A. 254.

Bucklew then advanced the theory (7) that his uvula completely obstructs his throat when he lies

flat, but that he can "manage his airway" by swallowing to move his uvula so long as he is conscious. J.A. 228, 390. To explain the importance of not lying supine, he asserted that pentobarbital would create a "twilight stage," J.A. 233–34—a time period where the chemical would supposedly render him immobile and unable to swallow, but leave him able to feel the pain associated with suffocation. J.A. 863. This supposed "twilight stage" was not alleged in his complaint. *See* J.A. 42–94.

Bucklew's "twilight stage" theory was his central argument before the Eighth Circuit. Both the majority and dissenting opinions understood that Bucklew could not prevail if he could not prove that he would be forced to lie supine. J.A. 868 (majority opinion); *see also* J.A. 872–73, 875 (dissenting opinion). The Court of Appeals ruled against Bucklew because the pleadings and the record established that he will not be forced to lie supine. J.A. 861 & n.3. Bucklew alleged in his Fourth Amended Complaint that the State had "offer[ed] to adjust the gurney so that Mr. Bucklew is not lying completely [supine]," and the State's Answer admitted that "Defendants offered to have the anesthesiologist position the angle of the gurney in a proper position." J.A. 861 & n.3. "Thus, this fact was established by the pleadings." *Id.* Moreover, "the Department will adjust the gurney so that Mr. Bucklew is not lying fully supine at the time the Department administers the lethal chemicals." J.A. 882. Testimony in the record also indicated that Bucklew will not have to lie supine. J.A. 531.

Bucklew has now apparently abandoned this theory as well. His opening brief does not mention the "twilight stage," and it argues that he will choke

and suffocate "regardless of his position—whether lying flat, upright, or anything in between." Br. 12. Instead, Bucklew's current theory (number 8) contends that difficulties accessing his peripheral and central veins will cause stress leading to the bleeding and rupture of his hemangioma. Br. 10–13.

Once again, the record contains no evidence supporting this theory. Bucklew focuses on the peripheral veins in his arms, Br. 7, but he expressly "concede[d] that there is no evidence in the Record establishing that Plaintiff has any problem with his veins *other* than his peripheral veins, including his femoral vein." J.A. 821 (emphasis in original). Bucklew's expert, Dr. Zivot, provided no evidence showing that Bucklew's *central* veins were problematic. J.A. 183–84. Central veins extend from the shoulders (subclavian), to the upper thigh and groin (femoral), and throughout the leg to the ankle (saphenous). J.A. 335, 347–48. The femoral vein is "easily accessed." J.A. 350. Furthermore, peripheral veins in the foot can be used to insert an IV, J.A. 337, and Bucklew has never provided any evidence that these veins are problematic.

The record also fails to support Bucklew's claim that he will likely endure a cutdown procedure. A cutdown procedure is not necessary to access a central vein, J.A. 185–86, 346–47; and the anesthesiologist on the medical team is trained to access central veins, J.A. 463.

Moreover, medical personnel have successfully inserted IV lines into Bucklew's veins while he lay supine numerous times in the past. J.A. 252. "[B]etween 2000 and 2003, Bucklew underwent general anesthesia eight times, at least once in a supine position." J.A. 864. In fact, Bucklew now

says he obtained a tracheotomy, which requires an IV, just last month. Br. 7 n.2.

Bucklew's current theory also alleges that, once pentobarbital is administered, he "will soon lose the ability to manage his airway," regardless of whether he is "lying flat, upright, or anything in between." Br. 12. But he previously insisted that he must actively swallow to manage his airway when *supine*. J.A. 228, 849, 863. No evidence suggests he has to swallow to manage his airway *all the time*. *See* J.A. 641–43. Bucklew has no need to "manage his airway" unless it is blocked. There is no reason to think that his airway will be blocked by his uvula if he is not supine. And no evidence demonstrates any likelihood of failed attempts to access his veins.

To the extent that Bucklew urges that "the stress of the execution" itself will cause his tumor to rupture, Br. 12, this concern is not unique to lethal injection. In fact, Bucklew pleaded that the stress of *any* execution would cause his tumors to rupture. *See* J.A. 78, 84–85. Because Bucklew admitted he would likely experience such breathing difficulties under any method of execution, this theory fails to identify any problem that nitrogen could fix.

No doubt, in his reply brief, Bucklew's theory will evolve again. If so, it will become the ninth meritless theory that he has advanced in this case.

All of Bucklew's theories suffer from the same deficiency—they all presume that he will remain able to feel pain for a prolonged period after administration of pentobarbital. No competent evidence supports this presumption, and "overwhelming evidence" contradicts it. J.A. 325. Pentobarbital will induce a deep, coma-like unconsciousness in Bucklew within 20-30 seconds,

and probably much sooner. J.A. 299–301, 402, 430–33, 440, 471–72. Once in this state, Bucklew will not be able to suffer pain from choking, bleeding, or any other source. J.A. 454, 456, 466. Thus, Bucklew's contention that "[i]t is undisputed that Bucklew will experience pain and suffering under Missouri's lethal injection protocol," Br. 10, is plainly misleading. *See* D.Ct. Doc. 200, at 4. The *only* pain that Bucklew will likely experience is the minor discomfort associated with inserting an IV. Once the pentobarbital enters his system, Bucklew will become swiftly oblivious to pain and suffering. J.A. 281, 286–87, 362, 389, 430.

IV. Bucklew's Proposed Alternative Procedure

In his Fourth Amended Complaint, Bucklew identified "lethal gas" as an alternative procedure. J.A. 52–53. Bucklew provided no details about his proposed procedure in the complaint, and his brief provides no details either, except to speculate that the State could deliver nitrogen with a gas mask and a canister. Br. 15.

Consistent with its decision to employ only the most humane method possible, Missouri uses lethal injection and has not used lethal gas since 1965. J.A. 667. Missouri's gas chamber "is no longer functioning" and sits in "a museum." J.A. 487.

Bucklew speculates that nitrogen might be administered through a gas mask, Br. 51, but Missouri officials are unaware of any instance of a State using a gas mask in an execution. Bucklew's expert reportedly stated: "Nothing is known about what might happen if the prisoner resists by thrashing or breaking the seal of his mask." Eli Hager, *Why Oklahoma Plans to Execute People With*

Nitrogen, THE MARSHALL PROJECT (March 15, 2018).[4] Moreover, unlike other methods, lethal gas may pose potential risks to witnesses and medical personnel. J.A. 492. It is unknown whether using a gas mask would aggravate those risks.

No State has ever conducted an execution by nitrogen hypoxia. Indeed, to date, no State has developed a method for doing so. When Missouri used lethal gas, it used cyanide gas, not nitrogen. J.A. 668. Oklahoma has announced that it intends to develop a protocol for lethal nitrogen, and other States may do so as well. But Bucklew concedes that Oklahoma has not yet done so, despite researching lethal nitrogen since 2015. Br. 53 n.6; *see also* Janelle Stecklein, *Execution Protocol Misses Deadline with No Planned Date to Resume*, THE NORMAN TRANSCRIPT (Aug. 8, 2018) (noting that Oklahoma has postponed the deadline to develop a protocol for lethal nitrogen).[5]

One Missouri official researched the feasibility of lethal gas, but he determined that "the research available was not sufficient" to address several unanswered questions. J.A. 491–92. These questions included "which gas is better," "what quantity or quality would I need to use," "[h]ow long it would take" to effect the execution, "the safety of the environment around it . . . for the individuals who are witnessing the execution," and "[d]elivery methods." *Id.*

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[4] https://www.themarshallproject.org/2018/03/15/why-oklahoma-plans-to-execute-people-with-nitrogen.

[5] http://www.normantranscript.com/news/execution-protocol-misses-deadline-with-no-planned-date-to-resume/article_e56b8ff1-b758-5a59-baeb-734fdc7018e9.html.

V. Procedural History

A. Bucklew delays bringing this suit.

In 2008, Bucklew retained an expert to review his medical records. That expert opined that Bucklew's cavernous hemangioma would interfere with circulation, prolonging any lethal injection. J.A. 658. Bucklew sought "to demonstrate, through expert medical services, that Missouri's method of execution, *as applied uniquely to Mr. Bucklew*, may constitute cruel and unusual punishment." J.A. 657 (emphasis in original).

Despite knowing the factual basis for his as-applied claim in 2008, Bucklew declined to assert that claim in a federal-preemption challenge to lethal injection in 2009. *Ringo* v. *Lombardi*, 677 F.3d 793, 795–96 (8th Cir. 2012). Then, when Bucklew brought a facial challenge to Missouri's lethal-injection protocol in 2012, he again declined to bring his as-applied challenge. *Zink* v. *Lombardi*, 12-04209-CV-C-BP (W.D. Mo. May 2, 2014).

Instead of asserting his as-applied claim in *Zink*, he filed this lawsuit—six years after he said he had an as-applied challenge and just 12 days before his scheduled execution. The statute of limitations is five years. Mo. Rev. Stat. § 516.120(4); *Wilson* v. *Garcia*, 471 U.S. 261, 266–68 (1985). Bucklew did not request permission from the district court to split his two theories (facial and as-applied) into two different lawsuits. On May 16, 2014, the district court in *Zink* dismissed his facial challenge with prejudice in a final judgment on the merits. *Zink*, Doc. 443, at 2. The Eighth Circuit affirmed. *Zink* v. *Lombardi*, 783 F.3d 1089, 1103 (8th Cir. 2015) (en banc).

B. Bucklew files five complaints.

The district court dismissed the first of Bucklew's five complaints because he declined to plead an alternative method of execution. *Bucklew* v. *Lombardi*, No. 14-8000-CV-W-BP, 2014 WL 2736014, at *6–7 (W.D. Mo. May 19, 2014). Bucklew's decision to delay suing until 12 days before his scheduled execution had left him no time to appeal, and this Court stayed his execution "pending disposition of petitioner's appeal." *Bucklew* v. *Lombardi*, 134 S. Ct. 2333 (2014). The Court of Appeals held that the plaintiffs raising as-applied challenges must plead an alternative method of execution. *Bucklew* v. *Lombardi*, 783 F.3d 1120, 1128 (8th Cir. 2015) (en banc).

The Court of Appeals instructed Bucklew to plead an alternative method of execution, but he refused to do so during three more attempts. J.A. 24, 25–26, 37. The district court then gave a "fifth and last . . . opportunity to correctly plead." J.A. 40. Bucklew's Fourth Amended Complaint then pleaded that the State could use "lethal gas," without further specification. J.A. 43.

C. The district court rejects Bucklew's attempt to obtain irrelevant discovery.

Bucklew "proposed massive discovery," J.A. 862, comprising "six broad categories," J.A. 121, including "identities of the execution team's medical members," J.A. 869. He also sought information about their qualifications and experiences; the "development" of the execution protocol; information about procurement, prescriptions, inventory, expiration dates, and attempts to obtain chemicals; and

information about maintenance, storage, and security of chemicals. J.A. 116–26.

The district court granted Bucklew "extensive discovery." J.A. 866. Among other things, it allowed him to discover information about the identity of the chemical to be used, its expected effect, the general composition of the medical team and functions of those persons, information about how the State had used cyanide gas, and information about the State's research into the feasibility of using nitrogen. J.A. 116–26.

But the district court rejected Bucklew's attempt to inquire into the identities, training, and qualifications of the medical personnel, because that information was irrelevant or at least disproportionate to the needs of the case. The district court determined that the information might have been relevant to Count II in the Fourth Amended Complaint—which alleged inadequate training and preparation—but that count had been dismissed with prejudice. J.A. 124. Bucklew could not rely on Count I, the district court held, because that "claim does not depend upon either the manner in which a lethal injection is performed or the qualifications of the execution team members." J.A. 664. In support of Count I, Bucklew had repeatedly pleaded that "*any* means of lethal injection" would be unconstitutional. J.A. 43 (emphasis in original); *accord* J.A. 49, 52, 72, 77, 84. And he never alleged that there would be difficulties accessing his veins. The district court concluded that the qualifications and identities of the execution team had little or no relevance. J.A. 664–65.

D. The district court grants summary judgment.

The district court granted the State's motion for summary judgment on Bucklew's sole remaining count. J.A. 817–32. Among other things, the district court held that "the use of Plaintiff's femoral vein does not present any risk of serious illness or needless suffering," and that "the Record establishes" that a central line can be inserted into Bucklew's femoral vein "without the risk of complications attributable to Plaintiff's congenital condition." J.A. 825. The district court noted that Bucklew had failed to "discuss Defendant's evidence that his femoral vein can be used to administer the execution drugs." *Id.* Bucklew "concede[d] that there is no evidence in the Record establishing that Plaintiff has any problem with his veins *other* than his peripheral veins." J.A. 821 (emphasis in original).

The district court granted summary judgment for the State because the record lacked any evidence that nitrogen hypoxia would significantly reduce Bucklew's alleged risk of severe pain. J.A. 830. The court held that "[t]here is no evidence suggesting that nitrogen hypoxia will be faster than pentobarbital, so there is no factual dispute to resolve." J.A. 830.

E. The Court of Appeals affirms.

The Eighth Circuit affirmed. The Court of Appeals determined that lying supine was central to Bucklew's claim, so he had to prove he would be forced to lie supine for lethal injection but not lethal gas. J.A. 863, 868. The court determined that this "argument lack[ed] factual support," J.A. 868, and

that the pleadings established that he would not have to lie supine. J.A. 861 & n.3.

Second, the Court of Appeals determined that the record did not include any evidence demonstrating that nitrogen would work faster than pentobarbital. J.A. 867–68. Contrary to Bucklew's suggestion, the court did not create a "single-witness rule." Br. 24. Instead, like the district court, it held that the record lacked any "*comparative* evidence" demonstrating that nitrogen would operate more quickly than pentobarbital. J.A. 867–68 (emphasis in original).

The dissenting opinion reasoned that a genuine dispute of fact could be created by selectively crediting different portions of Dr. Zivot's and Dr. Antognini's statements. J.A. 877. The dissenting opinion also concluded that there was a genuine factual dispute about whether Bucklew would be required to lie supine during the execution. J.A. 875.

SUMMARY OF ARGUMENT

This Court may affirm on any basis supported by the record, and it has a wealth of options here.

I. Bucklew failed to create a genuine dispute of fact under either of the two *Glossip* elements.

A. Bucklew failed to create a genuine dispute under the second *Glossip* element, which requires a "known and available alternative method[]" of execution. *Glossip*, 135 S. Ct. at 2738.

1. "Nitrogen hypoxia," without more, does not identify a "method" of execution. No State has ever executed an inmate using lethal nitrogen, and no protocol to do so exists at this time. A proposed method of execution that "has never been tried by a single State," *Baze*, 553 U.S. at 62, does not satisfy

the second *Glossip* element. To be sure, Oklahoma and other States may develop a valid protocol for lethal nitrogen, but even if they do so, Missouri would not be obligated to adopt it, especially not before it is thoroughly tested.

2. Bucklew also failed to provide any evidence of the severity and duration of pain from lethal nitrogen, and thus he failed to provide any meaningful basis for comparison with lethal injection. Because Bucklew failed to provide any details about how nitrogen gas would be administered, neither expert could provide any opinion about how quickly nitrogen would render Bucklew insensate to pain. Dr. Antognini testified that, depending on the method of administration, nitrogen "could . . . cause a lot of suffering," and "you might get more suffering from nitrogen gas than you would have Pentobarbital." J.A. 460.

3. Bucklew contends that the State "conceded" the feasibility and availability of lethal nitrogen by failing to dispute these questions in the district court, but the State's summary-judgment briefs vigorously disputed these issues. D.Ct. Doc. 182, at vi, 8–9; D.Ct. Doc. 200, at xxii, 7. In fact, in the district court, Bucklew himself stated that "there is a genuine issue of material fact as to whether lethal gas, including nitrogen hypoxia, is an available and feasible alternative method of execution." D.Ct. Doc. 199, at 20; *see also id.* 20–23.

B. Bucklew also failed to create a genuine factual dispute under the first *Glossip* element, because he failed to provide evidence that he is "sure or very likely" to experience severe pain from lethal injection. *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 50).

1. Bucklew failed to provide any evidence to show when pentobarbital would render him insensate to pain. The only estimate that his expert provided—52 to 240 seconds—referred to the time when pentobarbital would induce an "isoelectric EEG," which occurs long after a person becomes unable to feel pain. And even this 52-to-240-second estimate directly contradicted the study from which it was derived. Bucklew failed to create a genuine dispute with Dr. Antognini's testimony that pentobarbital would render Bucklew deeply unconscious and insensate to pain within 20-30 seconds, and probably much sooner.

2. Bucklew's theory of suffering from lethal injection hinges on his speculation that the execution team will botch multiple attempts to access his veins or commit other errors, causing stress that will rupture his tumors. Br. 10–13. Given the participation of a board-certified anesthesiologist and numerous other safeguards, any failed attempt to access Bucklew's veins or other unintended error would constitute "an isolated mishap" that "does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty." *Baze*, 553 U.S at 50 (quoting *Farmer* v. *Brennan*, 511 U.S. 825, 842 (1994)).

3. Missouri has several "legitimate penological justification[s]" to proceed with pentobarbital. *Baze*, 553 U.S. at 52. The State has an interest in waiting until a novel method is thoroughly tested before adopting it. Missouri also has an interest in "preserving the dignity of the procedure" by avoiding symptoms that "could be misperceived as signs of consciousness or distress." *Baze*, 553 U.S. at 57.

Whether nitrogen might raise such concerns is unknown. In addition, Missouri is entitled to proceed cautiously before adopting a procedure that might provoke public discomfort or outrage because of the historical associations of lethal gas.

II. Bucklew seeks to avoid these deficiencies of proof by arguing that the alternative-method element should not apply to as-applied challenges at all, but this argument has no merit. *Glossip* announced that proving an alternative method is "a requirement of *all* Eighth Amendment method-of-execution claims." *Glossip*, 135 S. Ct. at 2731 (emphasis added). The requirement is a "substantive element[]" of all such claims, *id.* at 2739, and thus it must be established whether the claim is facial or as-applied. In fact, the alternative-method requirement is essential to establishing that state officials acted with a culpable state of mind and intended to inflict "pain for the sake of pain." *Baze*, 553 U.S. at 48. Eliminating this element would permit as-applied challengers to seek a *de facto* exemption from the death penalty, contrary to this Court's instruction that "capital punishment is constitutional" and "there must be a means of carrying it out." *Id.* at 47.

III. Bucklew contends that the district court erred by preventing discovery into the execution team's training and qualifications. On the contrary, the discovery sought was irrelevant because it related to possibilities of accidents or isolated mishaps during Bucklew's execution, such as failed attempts to access his veins. As discussed above, given Missouri's numerous safeguards, any such error would be an "isolated mishap" that does not violate the Eighth Amendment. In addition, the district court had dismissed the only count to which

the discovery sought was relevant, and Bucklew never appealed that decision. Because existing evidence showed that Bucklew's various theories greatly overstated the risks of accidents, additional discovery would not have been proportional to the needs of the case, and it would have served only to burden and harass the members of the execution team. In any event, any error was harmless because Bucklew failed to provide any evidence of an alternative method of execution.

IV. Bucklew's claim is barred by the five-year statute of limitations, because he was aware of the factual basis for his as-applied challenge in 2008, but he did not file this lawsuit until 12 days before his scheduled execution in May 2014. His claim is also barred by *res judicata*, because he could have raised his as-applied challenge in the earlier-filed *Zink* case, which has reached final judgment. By choosing to split his claims, he assumed the risk that *Zink* would reach final judgment first, barring his claim.

ARGUMENT

I. Bucklew Failed to Provide Evidence Creating a Genuine Dispute of Fact Under Either *Glossip* Element.

To establish a method-of-execution claim, Bucklew must (1) prove that pentobarbital is "sure or very likely" to cause "objectively intolerable," "needless suffering." *Glossip*, 135 S. Ct. at 2737 (citations omitted). Bucklew must also (2) "identify a known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment method-of-execution claims." *Id.* at 2731. "To qualify, the alternative procedure must

be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain." *Baze*, 553 U.S. at 52.

"[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue," that party must provide affirmative evidence to "designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 324 (1986) (quoting Federal Rule of Civil Procedure 56(e)). Bucklew failed to provide evidence sufficient to create a "genuine issue for trial" on either of *Glossip*'s two elements. *Id.*

A. Bucklew failed to establish a known and available, readily feasible alternative method of execution.

Under the second *Glossip* element, Bucklew failed to carry his burden of proving what procedures would be used in his proposed alternative method of execution, the severity and duration of pain they would cause, and how that procedure compared to the State's method of execution.

1. Bucklew failed to identify any known and available "method" or "procedure" for lethal nitrogen.

First, Bucklew has never identified any known and available "method" or "procedure" of execution by nitrogen gas.

Baze and *Glossip* require Bucklew to identify an alternative "procedure," *Baze*, 553 U.S. at 52, or "method," *Glossip*, 135 S. Ct. at 2738, of execution. The method or procedure must be "known and available." *Id.* And the plaintiff must identify it with sufficient specificity to provide a meaningful

basis to assess the expected pain the proposed alternative will cause. *Baze*, 553 U.S. at 52; *Glossip*, 135 S. Ct. at 2737.

"Nitrogen hypoxia," without more, does not identify a "method" or "procedure" of execution. "Nitrogen hypoxia" is an agent, not a procedure. Any meaningful assessment of the risk of pain from nitrogen requires specific details about the method, rate, quantity, quality, concentration, delivery, and timing of its administration. *See* J.A. 490–92. For example, the State's expert, Dr. Antognini, testified without contradiction that nitrogen "could be introduced very slowly and cause a lot of suffering." J.A. 460. "[D]epending on—on how it's used, you might get more suffering from nitrogen gas than you would have from Pentobarbital. Or you might get less suffering." J.A. 460–61. Because he did not "know how quickly a gas is introduced" in a nitrogen-hypoxia execution, J.A. 460, any opinion about how quickly nitrogen would work would be "not . . . as well founded." J.A. 461.

Dr. Zivot did not disagree. Rather, he testified that "there's no way to ethically or practically test if nitrogen gas is a humane alternative," and thus "there's no way to tell if nitrogen gas would not be cruel." J.A. 158–59.

Thus, Missouri cannot conduct a nitrogen execution without knowing the quality and concentration of nitrogen needed. J.A. 491–92. But Bucklew provided no evidence to address any of the critical questions about "how it's used." J.A. 460. The record lacks any evidence about "the quantity or the concentration of the gas," or "what quantity or quality [the State] would need to use." J.A. 492.

Similarly, the degree of suffering from nitrogen hypoxia depends on "how quickly a gas is introduced." J.A. 460. Improper speed of administration during an execution could "cause a lot of suffering." *Id.* Experts on euthanizing animals with gases agree that knowing how quickly to disperse gas is "absolutely necessary" and is "critical to the humane application of inhaled methods." S. Leary, *et al.*, *AVMA Guidelines for the Euthanasia of Animals* 20 (2013).[6] Likewise, Dr. Zivot has admitted that a State cannot use lethal nitrogen without knowing "whether the nitrogen should be released gradually or all at once." Hager, *supra*. According to Dr. Zivot, "[n]o medical research exists" to address these critical questions. *Id.*

Bucklew also failed to provide any competent evidence to address "[d]elivery methods" for nitrogen, to answer whether the State would "need an actual chamber or would some kind of face mask or gas mask be sufficient," and "[i]f it was, what were the requirements of that." J.A. 491.

Bucklew suggests that administration of nitrogen "would require little more than a secure mask." Br. 51 (citing J.A. 736). But the report that he cites actually states that "the exact protocol and nitrogen delivery device have not been finalized," that "[o]ptions for the nitrogen delivery device include a mask or device similar to an oxygen tent house," and that "[r]esearch as to the best method of delivery is ongoing." J.A. 736. Bucklew's expert, Dr. Zivot, has agreed: "Nothing is known about what might happen if the prisoner resists by thrashing or breaking the seal of his mask." Hager, *supra*. To use

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[6] https://www.avma.org/KB/Policies/Documents/euthanasia.pdf.

lethal nitrogen, Missouri "would need to consider a protocol that is more elaborate than merely purchasing a hood or mask; Missouri would need time to develop a protocol to address risk of oxygen entering the hood; and Department of Corrections personnel would need to be trained on the process." D.Ct. Doc. No. 51, *Johnson* v. *Lombardi*, No. 2:15-CV-4237-DGK (W.D. Mo. May 1, 2017), at 10–11.

Any execution protocol for nitrogen would also have to address "the safety of the environment around" the execution "to protect . . . the individuals who are witnessing the execution." J.A. 492. Bucklew provided no evidence about how to minimize the risk of lethal gas leaks to observers. Nitrogen gas is odorless, colorless, difficult to detect, and deadly in high concentrations. For this reason, "Oklahoma officials may be grappling with concerns about how to safely administer the deadly, odorless gas without poisoning prison employees and execution bystanders." Stecklein, *supra*.

Therefore, Bucklew's proposed alternative is both vague and untested. But *Baze* emphasized that a plaintiff cannot bear his burden by relying on "untested alternative procedures." *Baze*, 553 U.S. at 54. A proposed method of execution that "has never been tried by a single State," *id.* at 62, and that "[n]o state uses or has ever used," *id.* at 53, does not suffice. *See id.* at 67 (Alito, J., concurring). Here, "nitrogen hypoxia ha[s] never been used to carry out an execution," and has "no track record of successful use." *McGehee* v. *Hutchinson*, 854 F.3d 488, 493 (8th Cir. 2017). Missouri's "continued use of the [one-drug] protocol cannot be viewed as posing an 'objectively intolerable risk' when no other State" has executed a prisoner by nitrogen hypoxia, and

Bucklew has "proffered no study showing that it is an equally effective manner of imposing a death sentence." *Baze*, 553 U.S. at 57.

2. Bucklew failed to provide evidence of the severity and duration of pain caused by nitrogen gas.

Bucklew failed to provide evidence of the severity and duration of pain that he might endure during execution by nitrogen, and thus he failed to provide any meaningful basis for comparison with lethal injection.

Bucklew contends that "there is reason to believe that breathing 100% nitrogen does not produce a sense of suffocation." Br. 16. But even if true, this contention is beside the point. Pentobarbital does not create a sense of suffocation, and Bucklew does not contend otherwise. He contends that he will suffocate on his tumor or blood, because he predicts that his hemangioma will block his airway and/or rupture during his execution. Br. 10–13. If his airway became blocked during an execution by nitrogen, that blockage would also produce a sense of suffocation, because he would be "unable to expel air." Br. 16. Therefore, the relevant question is not whether nitrogen induces a sense of suffocation. The relevant question is whether and how quickly pentobarbital and nitrogen, respectively, would render Bucklew insensate to the pain that he predicts from his blocked airway.[7] *See* J.A. 830.

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[7] For the same reason, Bucklew's assertion that high-altitude pilots do not experience feelings of suffocation when breathing in air low in oxygen is beside the point. Br. 16. Moreover, the district court refused to credit this argument when Bucklew presented it below and expressed "concern[]" that Bucklew tried

On this question, Bucklew provided no evidence. Neither Dr. Antognini nor Dr. Zivot provided any evidence to address how long it would take Bucklew to become unable to feel pain during an execution by nitrogen. Dr. Zivot testified that "there's no therapeutic use of nitrogen gas and there's no way to ethically or practically test if nitrogen gas is a humane alternative," J.A. 158, and that "there's no way to tell if nitrogen gas would not be cruel." J.A. 159.

Bucklew argues that Dr. Antognini testified that lethal nitrogen would take 20 to 30 seconds to render Bucklew insensate to pain. Br. 16. On the contrary, Dr. Antognini testified that how quickly someone would become unable to feel pain would "depend[] on how quickly the [nitrogen] gas is introduced." J.A. 460. He stated that someone might "quickly achieve hypoxia and . . . be unconscious very quickly," or that "it could be introduced very slowly and cause a lot of suffering." J.A. 460. "So depending on—on how it's used, you might get more suffering from nitrogen gas than you would have [from] Pentobarbital. Or you might get less suffering." J.A. 460–61. Because he did not "know how quickly a gas is introduced" in a nitrogen execution, J.A. 460, he stated that any opinion he could offer would be speculative and "not . . . as well founded." J.A. 461.

The Eighth Circuit dissent relied on Dr. Antognini's statement "that a person who is

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to rely on assertions that were "not competent medical evidence." J.A. 846. The district court rejected entirely Bucklew's reliance on a report that discussed high-altitude pilots (printed at J.A. 738–49) because the report was labeled "Preliminary Draft," carried the instruction "Do Not Cite," and failed to establish the author's medical qualifications. J.A. 831 n.9.

administered nitrogen gas 'would be unconscious very quickly,' and that the onset of action from lethal gas 'is going to be relatively fast, *just like Pentobarbital's onset.*'" J.A. 877 (quoting J.A. 458, 460) (emphasis added by the dissent). But Dr. Antognini's subsequent testimony clarified that any conclusions about nitrogen would depend heavily on the concentration and timing of nitrogen's release, about which he had no information. J.A. 459–60. He testified that, under certain protocols, nitrogen "could . . . cause a lot of suffering," and "you might get more suffering from nitrogen gas than you would have Pentobarbital." J.A. 460. By overlooking the immediate context of Dr. Antognini's testimony, the dissenting opinion failed to consider "the record taken as a whole." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

3. The State did not "concede" that nitrogen hypoxia is a feasible and readily available method.

Bucklew repeatedly asserts that, in the district court, the State "did not dispute that lethal gas was a feasible and readily available alternative method when moving for summary judgment," and he claims even that the State "conceded" this point. Br. 51–52 (citing J.A. 827); *see also* Br. 4, 7, 52. This assertion is incorrect.

The State's motion for summary judgment argued that "[t]he record refutes Bucklew's allegation that execution by gas is an alternative execution procedure that is feasibly and readily implemented." D.Ct. Doc. 182, at 8; *see also id.* at 8–9 (discussing specific evidence to support this contention). The State's Statement of

Uncontroverted Material Facts likewise stated that "[t]here is no way to determine that execution by gas is a feasible and readily implemented alternative method of execution," citing similar evidence. *Id.* at vi.

Though Bucklew now contends that State never made these arguments, his response brief in the district court admitted that the State contested this issue. His response brief stated that "Defendants now argue that the use of nitrogen hypoxia . . . is not a viable alternative," and that "there is a genuine issue of material fact as to whether lethal gas, including nitrogen hypoxia, is an available and feasible alternative method of execution." D.Ct. Doc. 199, at 20. In fact, he dedicated an entire section of his district-court brief to these disputed questions. *Id.* at 20–23.

In return, the State's summary-judgment reply brief argued that "Defendants do not agree that Missouri is capable of carrying out executions by lethal gas, and testimony in fact[] indicates that . . . research 'hit a wall' due to lack of necessary research articles and lack of expert opinions on the matter." D.Ct. Doc. 200, at xxii; *accord id.* at 7.

To be sure, the district court stated that "Defendants do not argue that this method of execution is not feasible or readily implemented," J.A. 827—a statement that the Eighth Circuit simply repeated without further comment. J.A. 866 ("Defendants do not argue that this is not a feasible and available alternative."). But the district court's statement, if construed as Bucklew urges, would be plainly erroneous, because the State repeatedly disputed this issue in its summary-judgment briefing. Instead, the district court was probably

referring (imprecisely) to the fact that the State did not dispute that lethal gas is *legally authorized* in Missouri under Mo. Rev. Stat. § 546.720. *See* D.Ct. Doc. 199, at 20; D.Ct. Doc. 200, at xxii. Statutory authorization alone, however, does not render a method "feasible and readily available." *See, e.g.*, *Baze*, 553 U.S. at 66 (Alito, J., concurring) (stating that a legally authorized method would not be "feasible" or "readily available" if it required the participation of physicians who were unavailable).

Moreover, even if Missouri had never raised this argument below, the State "may, of course, defend the judgment below on any ground which the law and the record permit." *Smith* v. *Phillips*, 455 U.S. 209, 215 n.6 (1982).

B. Bucklew failed to provide evidence showing that he is "sure or very likely" to suffer "severe pain" during lethal injection.

Bucklew also failed to provide evidence creating a genuine issue for trial on the first *Glossip* element—that he is "sure or very likely" to experience "severe pain" under the State's chosen method. *Glossip*, 135 S. Ct. at 2737.

1. Pentobarbital will render Bucklew insensate to pain within 20 to 30 seconds, and probably sooner.

Bucklew will not suffer "severe pain" or "serious harm" during lethal injection, because pentobarbital will render him deeply unconscious and insensate to pain within 20 to 30 seconds, and probably sooner.

Even assuming that Bucklew will experience a blocked airway during his execution, Dr. Zivot

provided no estimate of how long it would take Bucklew to become *insensate to pain* under the administration of pentobarbital. Rather, Dr. Zivot's time estimate addressed how long pentobarbital would take to cause Bucklew's brain to stop producing detectable brain waves—an "isoelectric EEG," colloquially called "brain death." J.A. 196. Dr. Zivot testified that an isoelectric EEG would occur at some unknown time between 52 and 240 seconds after pentobarbital administration. J.A. 196. But this estimate does not establish how long pentobarbital would take to render Bucklew unable to feel pain, because that point occurs substantially *before* an isoelectric EEG. An electroencephalogram (EEG) measures detectable brain waves on an index scale from 100 to 0. Jay W. Johansen, et al., *Development and Clinical Application of Electroencephalographic Bispectrum Monitoring*, 93 ANESTHESIOLOGY 1336, 1336 (2000). A reading of 100 refers to a person who is fully conscious. *Id.* An isoelectric EEG occurs when the EEG level drops to zero. *Id.* at 1336; J.A. 402.

People lose the ability to react to pain at EEG levels between 65 and 40, so patients are anesthetized to those levels when undergoing surgery. *Id.* fig. 1; *accord* Medical Advisory Secretariat (Canada), *Bispectral Index Monitoring: An Evidence-Based Analysis*, 4(9) ONTARIO HEALTH TECH. ASSESS. 15 fig. 2, 59 (2004)[8] ("[An index] value should be kept between 40 and 60 for patients undergoing general anesthesia.").

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[8] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3387745/pdf/ohtas-04-70.pdf.

To be sure, the district court stated that Dr. Zivot "addressed this issue in his deposition, explaining that the study's use of the term 'brain death' was a 'misnomer,' because the study marked 'brain death' before measurable brain activity terminated," and that Dr. Zivot "indicated that pain might be felt until measurable brain activity ceases." J.A. 822 & n.5 (quoting J.A. 196). But these statements misconstrued Dr. Zivot's testimony. Dr. Zivot did call "brain death" a "misnomer," but he testified that the study on which he relied identified "brain death" as "electrical silence on the parts of the brain that an electroencephalogram has access to"—in other words, "isoelectric EEG." J.A. 196. Thus, both Dr. Zivot and the study on which he relied explicitly addressed the point at which "measurable brain activity ceases." J.A. 822.

The district court's latter statement—that Dr. Zivot testified that "pain might be felt until measurable brain activity ceases," J.A. 822—lacks support in the record. Dr. Zivot never stated that, and if he had, it would have been plainly incorrect. General anesthesia renders persons insensate to pain without causing measurable brain activity to cease. In fact, when Dr. Zivot was asked, "Is there a point where [a horse receiving pentobarbital] wouldn't be able to feel or recognize pain *before* that complete cessation [of detectable brain activity]," he replied, "I have no way of knowing." J.A. 196 (emphasis added).

Moreover, Dr. Zivot's sole basis for this 52-to-240-seconds estimate was "a study on euthanizing horses, from 2015." J.A. 195. From this study, Dr. Zivot concluded that it could take "as long as about

two hundred and forty seconds before they see isoelectric EEG" from pentobarbital. J.A. 196.

But Dr. Zivot plainly misconstrued that study. The study reported that "[i]n the group of 9 horses, loss of EEG activity occurred from *2 to 52 seconds* (mean 23.7, SD 21.3, median 18 seconds)" after pentobarbital infusion. J.A. 267 (emphasis added). In other words, this study reported that isoelectric EEG in horses occurred, on average, after 23.7 seconds—directly supporting *Dr. Antognini's* estimate of 20 to 30 seconds to achieve deep unconsciousness from pentobarbital. The figure of 240 seconds that Dr. Zivot reported as the upper range of time for *pentobarbital*, J.A. 196, was drawn from a different portion of the study that addressed (ironically) *lethal gas* in dogs, not horses: "A study by Chalifoux and Dallaire demonstrated that EEG was lost 4 minutes after euthanasia with *carbon monoxide in dogs*." J.A. 272 (emphasis added).

Thus, Dr. Zivot's estimate that pentobarbital would take 52 to 240 seconds to achieve isoelectric EEG "blatantly contradicted" the study from which it was drawn, "so that no reasonable jury could believe it." *Scott* v. *Harris*, 550 U.S. 372, 380 (2007). "[A] court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.*

Dr. Zivot also provided no evidence estimating the starting time or ending time of the so-called "twilight stage." J.A. 192–94, 233–34. Dr. Zivot testified that Bucklew would experience "decreased brain activity" that prevents breathing "at some point," but he did not know when: "how long that will be, I cannot say, but at some point that will happen." J.A. 192. He testified that, at some unspecified time

"before then," Bucklew might experience a twilight stage: "And there will be points *before then* where . . . there will still be the experience capable of knowing that he cannot make the adjustment [to clear his airway], and will experience it as choking." *Id.* (emphasis added). And again, when asked whether horses receiving pentobarbital became insensate to pain at some point before they achieved isoelectric EEG, he replied, "I have no way of knowing." J.A. 196.

By contrast, Dr. Antognini testified that pentobarbital would render Bucklew deeply unconscious and oblivious to pain within 20 to 30 seconds of administration, if not sooner. J.A. 299–301, 302–304, 322, 325, 429, 432–33. This conclusion rests on "overwhelming evidence," J.A. 325, drawn from biological understanding of the drug's action, scientific studies, and witness accounts of executions. Medical experience also demonstrates the effectiveness of pentobarbital: "[Y]ou can actually do surgery with Pentobarbital," and "patients do not report pain and suffering." J.A. 430.

Moreover, Dr. Antognini testified that Bucklew will likely become insensate to pain "more quickly" than 20 to 30 seconds, for two reasons. First, the estimate is based on ordinary doses of barbiturates administered for anesthesia, while Missouri's protocol calls for an "overwhelming" dose, "a massive dose of the drug" with "overwhelming effect." J.A. 447, 456. When "the Pentobarbital is being given in a very large dose," then "you're going to achieve that endpoint [of unconsciousness] more quickly." J.A. 430–31.

Second, Dr. Antognini's 20-to-30-second estimate describes the point at which pentobarbital achieves a

"deep coma" at the "far end of the spectrum" of unconsciousness, and causing the inmate to become "basically brain dead." J.A. 402. As discussed above, the inmate loses sensitivity to pain *before* entering this state of "deep unconsciousness and coma." J.A. 430. Indeed, Dr. Antognini testified that Bucklew would most likely lose his ability to feel any "choking sensation" within "ten seconds" of pentobarbital's administration. J.A. 471. "It's not going to be in addition to the 20 to 30 seconds. It's . . . a ten second window within that 20 to 30 seconds." *Id.*

Thus, Bucklew provided no competent evidence to show how long pentobarbital would take to render him insensate to pain. The only competent evidence in the record is Dr. Antognini's conservative estimate that pentobarbital will render him insensate to pain within 20 to 30 seconds—and, more likely, within ten seconds. This short interval does not constitute "serious harm" under the Eighth Amendment, and it provides no basis to infer that state officials intend to inflict "pain for the sake of pain." *Baze*, 553 U.S. at 48, 50.

2. Bucklew forecasts only accidents and isolated mishaps that would not violate the Eighth Amendment.

Bucklew argues that failed attempts to access his veins and other possible unintended mishaps create a risk that he will suffer during his execution. Br. 9–13. But failed attempts to access veins are quintessential examples of "accidents" and "isolated mishaps," which do not violate the Eighth Amendment. *Baze*, 553 U.S. at 50.

"Simply because an execution method may result in pain, either by accident or as an inescapable

consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual." *Id.* (quoting *Farmer*, 511 U.S. at 846). "In other words, an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a 'substantial risk of serious harm.'" *Id.* (quoting *Farmer*, 511 U.S. at 842).

Bucklew repeatedly insists that the Eighth Circuit erred by "assuming" that the execution will go as "intended," Br. i, 23, 25, 28, 29. But this Court has held that, absent evidence to the contrary, courts "must and do *assume* that the state officials carr[y] out their duties under the death warrant in a careful and humane manner." *State of La. ex rel. Francis* v. *Resweber*, 329 U.S. 459, 462 (1947) (plurality opinion) (emphasis added). Thus, "the mere fact that a method of execution might have some *unintended* side effects does not amount to an Eighth Amendment violation." *Glossip*, 135 S. Ct. at 2740 n.3 (emphasis added). This presumption accords with many cases holding that state officials are presumed to act in good faith. *See, e.g.*, *Abbott* v. *Perez*, 138 S. Ct. 2305, 2324 (2018); *Alden* v. *Maine*, 527 U.S. 706, 755 (1999).

When a State's execution protocols involve substantial safeguards, one cannot conclude that an isolated mishap is "cruel and unusual." In *Baze*, the petitioners identified a long series of possibilities for human error in the administration of sodium thiopental, including (among many others) "inadequate facilities and training." *Baze*, 553 U.S. at 54. But this Court held that "asserted problems related to the IV lines do not establish a sufficiently

substantial risk of harm to meet the requirements of the Eighth Amendment," because "Kentucky has put in place several important safeguards" to address those issues. *Id.* at 55.

Missouri's protocol provides even greater safeguards than Kentucky's protocol. Missouri's protocol states the execution team includes both "a physician" and "a nurse." J.A. 213. Bucklew is aware that the team includes "an anesthesiologist" and "a nurse." J.A. 336, 380; *see also Zink* v. *Lombardi*, No. 2:12-CV-4209-NKL, 2013 WL 11762153, at *1 (W.D. Mo. June 18, 2013) ("M3 is a board-certified anesthesiologist licensed to practice medicine in Missouri"). The protocol directs the anesthesiologist and nurse to insert an IV in the "most appropriate" place to obtain access. J.A. 214. Both nurses and anesthesiologists are trained to obtain peripheral access, and "[e]very board-certified anesthesiologist is trained" to access central veins. J.A. 463. Moreover, at least one central vein—the femoral vein—is "easily accessed." J.A. 350. The medical team receives Bucklew's complete medical records—not just the summary touted by Bucklew. J.A. 627.[9] And the protocol provides for other protections similar to Kentucky's protocol, such as "redundant measures" to ensure that an adequate dose of pentobarbital is promptly administered. *Baze*, 553 U.S. at 55; J.A. 214.

Missouri's provision of numerous safeguards confirms that any individual problems—such as

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[9] The Director of the Division of Adult Institutions testified that he provides the execution team with a summary. J.A. 528. But the Warden of the facility conducting the execution testified without contradiction that the execution team also "receive[s] his medical records." J.A. 627.

difficulty accessing Bucklew's veins—would constitute "isolated mishaps" that do not violate the Eighth Amendment. *Baze*, 553 U.S. at 50.

3. Missouri has legitimate penological justifications to use pentobarbital.

To prove that the State's preferred method is "cruel and unusual," the inmate must also demonstrate that the State is adhering to it "without a legitimate penological justification." *Baze*, 553 U.S. at 52. "If a State refuses to adopt [the inmate's proposed] alternative in the face of . . . documented advantages, *without a legitimate penological justification* for adhering to its current method of execution, then a State's refusal to change its method can be viewed as 'cruel and unusual' under the Eighth Amendment." *Id.* (emphasis added).

Missouri has several legitimate penological justifications for its preferred method. First, the State has a strong interest in not switching to a novel method before it is thoroughly tested. Nitrogen hypoxia may turn out to be a valid and effective method of execution, as other States are exploring the option, but the Constitution does not require Missouri to adopt it when it is still untested. Missouri's method is considered "the most humane and effective method of execution possible." J.A. 705. Oklahoma law still provides that nitrogen hypoxia can be used only if lethal injection is unavailable or found unconstitutional. Okla. Stat. tit. 22, § 1014. Two-thirds of the States authorize capital punishment, and every one of those states authorizes lethal injection. D.Ct. Doc. 192-17, at 5–8. Missouri has used its single-drug method 20 times since adopting it, and every procedure has been successful.

D.Ct. Doc. 182-1, at 219; J.A. 526. No State has ever executed anyone by nitrogen hypoxia, and as of this writing, no State has yet developed a protocol to do so. Without "an alternative [that] is feasible and readily implemented," Missouri "has a legitimate penological justification for adhering to its current method of execution in order to carry out lawful sentences." *McGehee*, 854 F.3d at 493.

Similarly, Missouri "has an interest in preserving the dignity of the procedure." *Baze*, 553 U.S. at 57. The State may legitimately avoid a method that causes symptoms that "could be misperceived as signs of consciousness or distress." *Id.* For example, nitrogen hypoxia in some animals is known to induce "seizure-like behavior." Leary, *supra*, at 23. Because nitrogen hypoxia is untested, Missouri does not know whether it may cause such symptoms that undermine the dignity of the procedure, as earlier methods of lethal gas sometimes did. *See, e.g.*, *Gomez* v. *U.S. Dist. Court for N. Dist. of California*, 503 U.S. 653, 655 (1992) (Stevens, J., dissenting); *Gray* v. *Lucas*, 463 U.S. 1237, 1241 (1983) (Marshall, J., dissenting from denial of certiorari).

Moreover, Missouri may avoid adopting a procedure before knowing whether it will provoke public discomfort or outrage. When the New York legislature first convened a commission in the nineteenth century to recommend a better method, that commission rejected the guillotine in part because its use in the French Revolution's Reign of Terror made it "totally repugnant to American ideas." Stuart Banner, *The Death Penalty: An American History* 180 (2002). When States first adopted lethal gas, many people reacted negatively

because it reminded them of gases used by Germany in World War I. *Id.* at 199. Since then, Nazi Germany used lethal gases to perpetrate some of the greatest crimes in the history of humanity. *See* Tr. Oral Arg. at 18:5–6, *Glossip*, 135 S. Ct. 2726 (Sotomayor, J.) ("[P]eople probably don't want to use [gas] because of what happened during World War II."). Because it is untested and may have powerful historical associations, Missouri does not yet know what the public reaction to lethal gas might be.

II. An Inmate Raising an As-Applied Challenge Must Prove an Alternative, Feasible, Readily Available Method of Execution.

Contrary to Bucklew's contention, *Baze* and *Glossip* require an inmate raising an as-applied challenge to plead and prove an alternative, readily feasible method of execution.

A. The alternative-method requirement is a "substantive element" of all method-of-execution claims.

First, though it addressed a facial challenge, *Glossip* announced that proving an alternative method is "a requirement of *all* Eighth Amendment method-of-execution claims." *Glossip*, 135 S. Ct. at 2731 (emphasis added). *Baze* and *Glossip* drew no distinction between facial and as-applied claims: "The controlling opinion in *Baze* outlined what a prisoner must establish to succeed on an Eighth Amendment method-of-execution claim." *Id.* at 2737.

Baze and *Glossip* "made clear that the Eighth Amendment requires a prisoner to plead and prove a known and available alternative." *Glossip*, 135 S. Ct. at 2739. The alternative-method requirement is not

a procedural rule or equitable requirement, but "a substantive element[] of an Eighth Amendment method-of-execution claim." *Id.* Whether raising a facial or as-applied challenge, an inmate must prove every "substantive element" of his claim. *Id.* For this reason, the lower courts have concluded that this requirement holds for as-applied challenges. *See Bucklew*, 783 F.3d at 1128; *Arthur* v. *Comm'r, Alabama Dep't of Corr.*, 840 F.3d 1268, 1305 (11th Cir. 2016), *cert. denied sub nom. Arthur* v. *Dunn*, 137 S. Ct. 725 (2017); *Gissendaner* v. *Comm'r, Ga. Dep't of Corr.*, 779 F.3d 1275, 1283 (11th Cir. 2015) (per curiam).

Baze and *Glossip* "beg[a]n with the principle, settled by *Gregg*, that capital punishment is constitutional. It necessarily follows that there must be a means of carrying it out." *Baze*, 553 U.S. at 47 (citations omitted); *see also Glossip*, 135 S. Ct. at 2732–33. Contrary to Bucklew's argument, this principle is equally valid for as-applied challenges. Because capital punishment is constitutional, there must be a means of executing an individual prisoner lawfully sentenced to death. An inmate who prevailed on an as-applied challenge without identifying an alternative means of execution would obtain an effective exemption from capital punishment.

B. When no alternative method is feasible and available, the State is not inflicting "pain for the sake of pain."

Bucklew contends that the alternative-method requirement addresses only "the difficulty of evaluating whether a given method of execution inherently presents a substantial and unjustified

risk of severe pain." Br. 39. This argument overlooks long-settled Eighth Amendment doctrine. The Eighth Amendment requires a showing of subjective culpability by state actors. Absent an alternative method, one simply cannot infer that state officials were subjectively culpable in adopting the method they chose. Whether the claim is facial or as-applied, if no feasible alternative is available, one cannot conclude that the State is imposing "pain for the sake of pain." *Baze*, 553 U.S. at 48.

It is well settled that this Court's "cases mandate inquiry into a prison official's state of mind." *Wilson* v. *Seiter*, 501 U.S. 294, 297 (1991). "To violate the Cruel and Unusual Punishments Clause, a prison official must have a sufficiently culpable state of mind." *Farmer*, 511 U.S. at 834.

Baze and *Glossip* did not create an exception to this longstanding principle. Rather, they explicitly reaffirmed it. *Baze* held that a method-of-execution claim requires showing "'an objectively intolerable risk of harm' *that officials may not ignore*." *Baze*, 553 U.S. at 50 (quoting *Farmer*, 511 U.S. at 846 & n.9) (emphasis added). And *Baze* stated that "'an accident,' *with no suggestion of malevolence*, did not give rise to an Eighth Amendment violation." *Id.* (quoting *Resweber*, 329 U.S. at 463) (emphasis added). Likewise, both cases held that "there must be 'a substantial risk of serious harm,' an objectively intolerable risk of harm that prevents prison officials from pleading that they were *subjectively blameless* for purposes of the Eighth Amendment." *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 50) (quotation marks omitted) (emphasis added).

The alternative-method element is indispensable to proving that state officials are not "subjectively

blameless." *Id.* During executions, what the Eighth Amendment forbids is not the infliction of pain—which is a risk in virtually all executions—but "the *deliberate* infliction of pain *for the sake of pain*." *Baze*, 553 U.S. at 48 (emphases added). "Some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure." *Id.* at 47.

To determine what pain is prohibited by the Eighth Amendment, *Baze* recounted that, in *Wilkerson*, the Court "cited cases from England in which 'terror, pain, disgrace were sometimes superadded to the sentence, such as where the condemned was 'emboweled alive, beheaded, and quartered,' or instances of 'public dissection in murder, and burning alive.'" *Baze*, 553 U.S. at 48 (quoting *Wilkerson* v. *Utah*, 99 U.S. 130, 135–36 (1879)). *Baze* also quoted *Kimmler*'s statements that "[p]unishments are cruel when they involve torture or a lingering death," and that the word "cruel" in the Eighth Amendment "implies there something inhuman and barbarous." *Baze*, 553 U.S. at 49 (quoting *In re Kimmler*, 136 U.S. 436, 447 (1890)). *Baze* concluded that "[w]hat each of the forbidden punishments had in common was the deliberate infliction of pain for the sake of pain." *Baze*, 553 U.S. at 48; *see also Glossip*, 135 S. Ct. at 2732.

Thus, the alternative-method requirement is essential to proving that the choice of procedure arose from "malevolence," *id.* at 50—*i.e.*, "the deliberate infliction of pain for the sake of pain." *Id.* at 48. Without any available, substantially less painful alternative, one simply cannot infer that the State has chosen its method to inflict "pain for the sake of pain." *Id.* Similarly, one cannot infer that

state officials are deliberately indifferent to suffering when they lack a readily feasible alternative method. Unless state officials were to "superadd[] pain to the death sentence, through torture and the like," *id.*, they are not acting malevolently when they select the only readily available method.

In sum, "whether [official conduct] can be characterized as 'wanton' depends upon the constraints facing the *official*." *Wilson*, 501 U.S. at 303 (emphasis in original). The absence of an alternative method is a "constraint[] facing the official." *Id.* Without an alternative method of execution, state officials lack any "subjectively culpable state of mind" in selecting the option available, *Farmer*, 511 U.S. at 846 n.9, and they are not inflicting "pain for the sake of pain." *Baze*, 553 U.S. at 48.

C. Eliminating the alternative-method requirement would encourage meritless claims and delay many executions.

Abolishing the alternative-method element for as-applied challenges would encourage meritless claims that could impose additional years of delay before many executions. If as-applied challenges become far easier to plead and prove, many inmates will undoubtedly assert them, potentially delaying many executions.

Because of procedural requirements in capital cases, the delay between issuing a lawful capital sentence and carrying out that sentence has increased drastically. In the 1930s, the delay in Texas was six weeks; in the 1950s, five months. Banner, *supra*, at 216. Now, the average delay is 18 years, and it has been predicted to grow to more than

37 years. *Glossip*, 135 S. Ct. at 2764–65 (Breyer, J., dissenting). In the light of these delays, many inmates will allege that they have developed *some* medical condition before the State can carry out a lawful sentence.

Nor will inmates feel constrained to sue about their medical conditions only once. Just as Bucklew has done, those inmates will assert that their medical conditions keep changing and growing worse. Like Bucklew, they will assert that those changes create brand new claims that evade statutes of limitations and preclusion doctrines. Each new case could impose additional years of delay before execution.

This case provides a prime example of the potential for even meritless as-applied challenges to impose long delays. As discussed above, Bucklew's challenge to Missouri's single-drug protocol was facially implausible from the outset, because overwhelming evidence shows that pentobarbital will swiftly render him deeply unconscious and insensate to pain. His expert's testimony on critical issues lacks credibility and contradicts the record.[10] Yet Bucklew has used this implausible claim, propped up by non-credible testimony, to obtain two stays of execution and delay his sentence for over four years.

Missouri has already been forced to defend as-applied challenges to methods of execution in recent years. *See, e.g.*, *Clayton* v. *Lombardi*, No. 4:15-CV-470-AGF, 2015 WL 1222399, at *7–8 (E.D. Mo. Mar.

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[10] As the Eighth Circuit dissent noted, "[t]here certainly are grounds to attack the reliability and credibility of Dr. Zivot's opinion," including "the imprecision of some of his testimony," "his opposition to all forms of lethal injection," and "his inaccurate predictions of calamities at prior executions." J.A. 876.

17, 2015); ECF No. 51, *Johnson* v. *Lombardi*, No. 2:15-CV-4237-DGK (W.D. Mo. May 1, 2017). Other States have faced similar challenges. If the Court were to adopt Bucklew's position, the States would face an explosion of these claims in the future.

III. The District Court Did Not Abuse Its Considerable Discretion When It Denied Bucklew's Discovery Request.

Federal appellate courts "review a district court's discovery rulings narrowly and with great deference and will reverse only for a 'gross abuse of discretion resulting in fundamental unfairness.'" J.A. 870 (quoting *Marksmeier* v. *Davie*, 622 F.3d 896, 903 (8th Cir. 2010)). "That standard of review reflects the district court's superior familiarity with, and understanding of, the dispute; and it comports with the way appellate courts review related matters of case management, discovery, and trial practice." *United States* v. *Clarke*, 134 S. Ct. 2361, 2368 (2014). Discovery rulings should be reversed only "under very unusual circumstances." Wright & Miller, 8 FED. PRAC. & PROC. CIV. § 2006 (3d ed., April 2018 supp.). No such abuse of discretion occurred here.

A. Isolated mishaps, such as failed attempts to access veins, do not violate the Eighth Amendment.

Bucklew argues that the district court erred by failing to grant him discovery into "the training and qualifications of the medical personnel on the execution team," M2 and M3. Br. 30. But the information requested was relevant only to show that failures to access Bucklew's veins or other mishaps might occur during the execution. For the

reasons stated above, *supra* Part I.B.2, any such "isolated mishap" would not violate the Eighth Amendment. *Baze*, 553 U.S. at 50.

In rejecting Bucklew's request for more discovery, the Eighth Circuit held that the "evaluation must be based on the as-applied pre-execution protocol, assuming that those responsible for carrying out the sentence are competent and qualified to do so." J.A. 871. This holding faithfully followed *Baze* and *Glossip*, which held that accidents and isolated mishaps do not violate the Eighth Amendment. Because the discovery sought was irrelevant as a matter of law, the district court did not abuse its discretion in denying it.

B. The district court had dismissed the only count to which the execution team's training was relevant.

The discovery sought was also irrelevant because the district court had already dismissed the only count to which it pertained. As the district court noted, in Count I of the complaint—the sole count to survive the State's motion to dismiss—"Plaintiff does not contend that using different chemicals, or administering chemicals in a different way, will diminish the risk of pain and suffering." J.A. 662. Rather, "[a]ccording to Count I, the only way to significantly diminish the pain and suffering resulting from lethal injection is to execute Plaintiff with lethal gas." *Id.* "Count I also does not allege that more or different training will decrease these risks." *Id.* Bucklew repeatedly alleged that "[a]ny attempt to execute Mr. Bucklew under Missouri's present protocol, or by *any* means of lethal injection,"

would lead to excruciating pain. J.A. 43 (emphasis in original); *see also* J.A. 49, 52, 72, 77, 84.

By contrast, Bucklew alleged in *Count II* that various changes to the execution procedure—such as the composition of the execution team—might reduce his suffering. "Count II alleged that Plaintiff 'will experience pain and suffering unless certain changes are made in the lethal injection protocol.'" J.A. 662 (quoting D.Ct. Doc. 63, at 14). Count II alleged that medical personnel would fail to take "reasonable and necessary steps to assess and address the risks Bucklew faces." J.A. 113.

By the time of the discovery dispute, the district court had "dismissed Count II because the Fourth Amended Complaint did not 'allege sufficient facts to indicate that the staffing and planning procedures Defendants intend to utilize will create a substantial risk of serious harm' and 'does not allege what procedures should be employed (other than not performing an execution).'" J.A. 662 (quoting D.Ct. Doc. 63, at 14–15.). Bucklew never appealed from the dismissal of Count II of the Fourth Amended Complaint, so that decision became a final judgment on the merits as to those allegations. Fed. R. Civ. P. 41(b). Bucklew cannot relitigate that claim now.

Bucklew insists that the execution team's training and qualifications were relevant to prove his theory that they will bungle their attempts to access his veins. Br. 10–13, 33. But the Fourth Amendment Complaint never made any allegation that his suffering would be caused or aggravated by difficulties in accessing his veins. *See* J.A. 42–94. The only allegation regarding his "weak, malformed veins" stated that there was a risk that his veins would rupture if they received too much fluid, not

that medical personnel would have trouble accessing the veins. J.A. 62. And the district court rejected this argument, noting that "the Record establishes that . . . the use of Plaintiff's femoral vein does not present any risk of serious illness or needless suffering." J.A. 825.

C. Bucklew's request was disproportional to the needs of the case because existing evidence refuted Bucklew's claim.

Bucklew contends that the additional discovery would demonstrate that, due to medical personnel's lack of training, he will suffer "repeated, failed attempts to gain peripheral venous access, that the tumor on his uvula will rupture early in the process," and that his breathing difficulties will compound "during a cutdown procedure." Br. 30; *see also* Br. 9–13, 33. Existing evidence refutes each of the steps in Bucklew's series of alarmist predictions.

First, Bucklew speculates that he will undergo repeated failed attempts to access a peripheral vein. But the execution protocol directs the "[m]edical personnel" to "determine the most appropriate locations for intravenous (IV) lines," and provides that they "may insert the primary IV . . . as a central venous line." J.A. 214. Bucklew's expert agrees that medical personnel typically attempt to "place the needle in the best available vein." J.A. 231. In addition, access to peripheral veins "could be in the foot," which "often" occurs "in a clinical setting." J.A. 337. Bucklew provided no evidence that there was any problem with the peripheral veins in his feet. Thus, there is no factual basis for Bucklew's prediction that he will suffer many failed attempts to access peripheral veins.

Second, the record refutes any suggestion that Bucklew will likely endure failed attempts to access his *central* veins, such as the femoral vein. Bucklew has never provided any evidence that his central veins are difficult to access. J.A. 821. In fact, Bucklew has "concede[d] that there is no evidence in the Record establishing that Plaintiff has any problem with his veins *other* than his peripheral veins, including his femoral vein." J.A. 821 (emphasis in original). In opposing summary judgment, Bucklew "d[id] not present any legal arguments" relating to "the use of his femoral vein." J.A. 825. The anesthesiologist on the execution team is trained to access central veins, J.A. 463, and the femoral vein is "easily accessed," J.A. 350. An inexperienced anesthesiologist was able to access a central vein on the first attempt 90 percent of the time. J.A. 185–86.

Third, the record does not support Bucklew's prediction that he will undergo a cutdown procedure to access a central vein. A cutdown procedure is used only when, after employing "the usual methods," "they can't access it peripherally" and "they can't get a central venous line placed." J.A. 346. Cutdown procedures are usually reserved for trauma patients. *Id.* Access to central veins by "the usual methods," *id.*, is extremely likely to succeed on the first attempt, and multiple attempts are possible if necessary. J.A. 185–86.

Under these circumstances, additional discovery would not have been "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). It would have served only to delay proceedings and harass members of the execution team. *See Zink* v. *Lombardi*, 783 F.3d 1089, 1106 (8th Cir. 2015). Bucklew belatedly

suggests that it would be appropriate to proceed by interrogatory or remote deposition to protect the identities of M2 and M3. Br. 33. But, in the proceedings below, Bucklew "never urged the district court to establish a suitable fact-finding procedure—for example, by anonymous interrogatories or written deposition questions to the execution team members." J.A. 869.

D. Any error was harmless because Bucklew failed to prove an alternative method of execution.

Any error in the discovery order was also harmless because the discovery sought pertained only to the first *Glossip* element, but Bucklew failed to meet his burden under the second *Glossip* element, as discussed above. *Supra*, Part I.B.

IV. Bucklew's Claim Is Barred by the Statute of Limitations and *Res Judicata*.

In the courts below, the State argued that Bucklew's complaint was barred by the statute of limitations and *res judicata*. No court has yet ruled on these defenses, and the State may "defend the judgment below on any ground which the law and the record permit." *Phillips*, 455 U.S. at 215 n.6.

First, Bucklew's claim is barred by the statute of limitations. In 2008, Bucklew filed an application for funds stating that he suffered from "a rare and dangerous vascular disorder" that was "characterized by grossly dilated blood vessels prone to uncontrollable bleeding," J.A. 656, and that he would likely suffer "serious harm amounting to cruel and unusual punishment during the administration of Missouri's lethal injection protocol in light of his

affliction with cavernous hemangioma." J.A. 657. He sought "to demonstrate, through expert medical services, that Missouri's method of execution, *as applied uniquely to Mr. Bucklew*, may constitute cruel and unusual punishment." *Id.* (emphasis in original). A supporting expert affidavit opined that Bucklew's "high-flow cavernous hemangiomas" would "cause slowing of the sodium pentothal to reach the circulatory system of the brain." J.A. 658. This same theory became the centerpiece of the Fourth Amended Complaint in this case. J.A. 45, 47, 56, 62, 64–65, 67, 73, 84.

Bucklew chose not to raise this claim until May 2014—six years after his 2008 application, and 12 days before his scheduled execution. The statute of limitations is five years. *See* Mo. Rev. Stat. § 516.120(4) (five-year statute of limitations for "any other injury to the person or rights of another"); *Wilson* v. *Garcia*, 471 U.S. 261, 266–68 (1985) (holding that 42 U.S.C. § 1983 incorporates the most analogous state-law statute of limitations for constitutional torts); J.A. 852.

Bucklew argued below that he "lacked sufficient information to assert this claim until Dr. Zivot examined his medical records in April 2014." J.A. 852. But Dr. Zivot simply repeated what Bucklew's first expert had done. Both doctors reviewed Bucklew's medical records and opined that lethal injection would be unconstitutional in all circumstances because of Bucklew's purported circulatory problems. J.A. 92, 658. Bucklew's first expert asserted that he wanted to conduct additional research and conduct an exam. J.A. 658. But Dr. Zivot did the same. Dr. Zivot did not examine Bucklew until May 12, 2014, *after* Bucklew filed his

initial complaint. D.Ct. Doc. 182-1 at 187–88; J.A. 47, 65.

Second, for similar reasons, Bucklew's claim is barred by *res judicata*. "[A] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980). In a previous suit, *Zink* v. *Lombardi*, No. 12-04209-CV-C-BP (W.D. Mo.), Bucklew challenged the facial validity of Missouri's lethal injection protocol. Bucklew could have pleaded his as-applied claim in that suit, but he chose not to. When that suit became final, it barred him from bringing his as-applied claim.

On May 2, 2014, the district court in *Zink* directed Bucklew to amend his facial challenge to lethal injection, but it stated that he could not amend his other counts. *Zink*, 12-04209-CV-C-BP, 2014 WL 11309998, *12 (W.D. Mo. May 2, 2014). The Eighth Circuit dissent opined that this order prohibited Bucklew from pleading his as-applied claim in *Zink* because it restricted what he could raise in the amended pleading. J.A. 880–81. That analysis fails for three reasons.

First, the dissent assumed that Bucklew learned the factual basis for his claim in April 2014, and so he could not have raised that claim in *Zink* before then. J.A. 879–80. But Bucklew learned the factual basis for his claim in 2008, so he could have raised it at any time from the very beginning of the *Zink* litigation. He had many opportunities to do so before May 2014.

Second, a plaintiff cannot avoid *res judicata* simply because of the "mere refusal of the court in the first action to allow an amendment of the

complaint to permit the plaintiff to introduce additional material." RESTATEMENT (SECOND) OF JUDGMENTS § 26 cmt. b (1982). Instead, a plaintiff must request permission from the court to split claims into separate suits, or else to seek leave to amend and then "appeal from an adverse judgment" if the court denies leave. *Id.*

Third, the district court did not issue that order until May 2, a month *after* Bucklew asserts that he first learned the basis for his as-applied claim. J.A. 852. Bucklew's execution was already scheduled for May 21, 2014. Given his imminent execution date, Bucklew could and should have promptly sought leave to add the claim in *Zink*. In fact, he filed this separate suit on the very same day he was supposed to re-plead in *Zink*. He could have asserted his as-applied claim in *Zink*, but he chose to split his claims and initiate another suit instead without seeking leave to split his claims. In doing so, he assumed the risk that *Zink* would reach final judgment first and bar his claims in this lawsuit.

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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